88-270

NO.

Supreme Court, U.S.
FILED
AUG 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court of the United States

John Marlin Foster and Virginia Scranton Foster

Petitioners

vs.

G. D. MILLIKEN, JR.

Respondent

MOTION TO DENY PETITION FOR WRIT OF CERTIORARI AND BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FOR LACK OF PROPER JURISDICTION IN THE SUPREME COURT OF THE UNITED STATES

G. D. MILLIKEN, JR.
Attorney At Law
P.O. Box 1926
Bowling Green, KY 42101
(502) 781-6800

IN THE SUPREME COURT OF THE UNITED STATES

JOHN MARLIN FOSTER and VIRGINIA SCRANTON FOSTER

Petitioners

vs.

G. D. MILLIKEN, JR.

Respondent

MOTION TO DENY PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Kentucky

G. D. Milliken, Jr.
Attorney At Law
P.O. Box 1926
Bowling Green, KY 42101
(502) 781-6800

Come the Respondent, G. D. Milliken, Jr., and moves the Court to deny the Petition for Writ of Certiorari from the Supreme Court of Kentucky on the ground that the Petitioner does not present a substantial federal question and that no federal question was raised or presented before the Supreme Court of Kentucky and that the final decision of the Court of Appeals upon which the Motion for Discretionary Review was denied by the Supreme Court of Kentucky and rested on an adequate non-federal basis.

In support of this Motion the Respondent files a Brief in opposition to the Petition for Writ of Certiorari, opposition being based upon lack of proper jurisdiction.

This the 12 day of Aug, 1988

G. D. Milliken, Jr.

G. D. Milliken, Jr.

CERTIFICATION

This is to certify that a true and correct copy of the foregoing was this day mailed to Mr. John M. Foster, Pro Se, 5121 Gallatin Road, Scottsville, Kentucky 42164 and a copy to Hon. John C. Scott, Clerk of the Supreme Court of Kentucky, Capitol Building, Frankfort, Kentucky 40601.

This the 12 day of Aug., 1988

G. D. Milliken, Jr.

G. D. Milliken, Jr.

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QUESTION OF JURISDICTION PRESENTED

The Petition for Writ of Certiorari having failed to present a federal question, no federal question having been presented before the Supreme Court of Kentucky, the final decision of the Court of Appeals, upon which the Discretionary Review was denied by the Supreme Court of Kentucky having rested on adequate nonfederal basis, does this Petition for Writ of Certiorari meet the Supreme Court of the United States jurisdictional requirements of Part V Jurisdiction on Writ of Certiorari, Rule 17 Considerations Governing Review on Certiorari?

TABLE OF AUTHORITIES

1. Kentucky Revised Statutes 376.460.

2. Rule 73.01.

3. Rule 73.03.

4. Hutchinson et al vs. Hutchinson, 168 S.W. 2nd 738 (Ky) 1943.

5. Braden vs. Republic-Vanguard Life Insurance Company, 637 S.W. 2nd 241 (Ky) 1983.

6. Part V, Rule 17 Jurisdiction on Writ of Certiorari United States Supreme Court Rules.

IN THE SUPREME COURT OF THE UNITED STATES

JOHN MARLIN FOSTER and VIRGINIA SCRANTON FOSTER

Petitioners

vs.

G. D. MILLIKEN, JR.

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FOR LACK OF PROPER JURISDICTION

To the Supreme Court of Kentucky

G. D. Milliken, Jr.
Attorney At Law
P.O. Box 1926
Bowling Green, KY 42101
(502) 781-6800

Comes the Respondent, G. D. Milliken, Jr., and in opposition to the Petition for Writ of Certiorari and states that the Petition for Writ of Certiorari does not state grounds for jurisdiction of this action in the Supreme Court of the United States.

The Supreme Court of Kentucky and the Court of Appeals of Kentucky have not decided a federal question upon which a Writ of Certiorari should be granted.

The case upon which the Court of Appeals of Kentucky ruled and upon which the Supreme Court of Kentucky denied a Motion for Discretionary Review is the case of Transportation Cabinet, Commonwealth of Kentucky, Departments of Highways vs. John M. Foster and Virginia Foster, in the Allen, Kentucky Circuit Court, being action no 84-CI-000032.

This was an action in which the Transportation Cabinet, Commonwealth of Kentucky, Department of Highways sought to and did condemn the property belonging to John M. Foster and Virginia Foster for the purpose of construction of a major Kentucky highway.

The Petitioner, John M. Foster and his wife Virginia Foster, were represented in this action by three different attorneys, all of whom withdrew their representation of the Petitioners, John M. Foster and Virginia Foster for varying and justifiable reasons.

The Respondent in this action withdrew as attorney for the Petitioners for the reason that the Petitioner, John M. Foster, wrote letters stating that he would not accept a decision of the Court of Appeals of Kentucky, which had rendered an opinion in the case of **Commonwealth of Kentucky vs. Sherrod**, 367 S.W. 2nd 844 relating to proper procedure in condemnation actions. In these letters John M. Foster attempted to reflect on the integrity and knowledge of the law of the Judges of the Court of Appeals of Kentucky renered this decision relating to condemnation proceedings. In addition, John M. Foster wrote threatening and disrespectful letters to this Respondent.

Withdrawal of Respondent as attorney for John M. Foster met the approval of John M. Foster and Virginia Foster when the Motion was presented in the Allen Circuit Court.

Having expended 144 hours and 55 minutes in the representation of John M. Foster and Virginia Foster over a period of many months in this action the Respondent filed a lien for attorney's fees pursuant to Kentucky Revised Statute 376.460.

The Allen Circuit Court directed the parties to appear before the Court for a determination of the amount of attorney's fee which should be allowed to the Respondent pursuant to the provisions of the above mentioned statute.

After hearing the argument of John M. Foster and G. D. Milliken, Jr. on two separate occasions, the Court entered an Order dated August 27, 1987 in which the Court found that the Defendants had previously paid G. D. Milliken, Jr. the sum of $2,500.00 as a retainer fee and $250.00 toward

the cost of the case and found from all of the evidence that an additional fee of $1,250.00 would be appropriate.

This Order appears on Pages A3-A9 of the Appendix filed by the Petitioner.

The Petitioner filed a "Notice of Appeal" to the Court of Appeals of Kentucky, which was styled as follows: Commonwealth of Kentucky, 49th Judicial District, Allen Circuit Court Case No. 84-CI-032, Commonwealth of Kentucky, Transportation Cabinet, Department of Highways, Plaintiff vs. Notice of Appeal, John M. Foster and wife Virginia Foster, Defendants. A copy of this Notice of Appeal is attached to the Appendix of this Brief.

A Motion to Dismiss the Appeal was filed in the Court of Appeals of Kentucky on the ground that the Defendants, John M. Foster and wife Virginia Foster, had failed to comply with Rule 73.01 and Rule 73.03 of the Rules of Civil Procedure. Copies of these Rules are made a part of the Appendix.

The Court of Appeals of Kentucky entered an Order dated November 16, 1987 in which it dismissed the Appeal of John M. Foster and Virginia Foster for the reason that they had failed to comply with the provisions of Rule 73.03 of the Kentucky Rules of Civil Procedure.

A copy of the Order of the Court of Appeals is filed as a part of the Appendix.

It is to be noted that there was no issue relating to Federal Law or Constitutional Law involved in the Order of the Court of Appeals of Kentucky in this case.

A Motion for Reconsideration of this Order was filed by John M. Foster and the Court of Appeals of Kentucky entered an Order on January 21, 1988 denying the Motion for Reconsideration. A copy of this Order is filed with the Appendix.

Subsequently, John M. Foster and Virginia Foster filed a Motion for Discretionary Review in the Supreme Court of Kentucky relating to the Order entered by the Court of Appeals on November 16, 1987.

The Supreme Court of Kentucky denied the Motion for Discretionary Review. A copy is attached to the Appendix

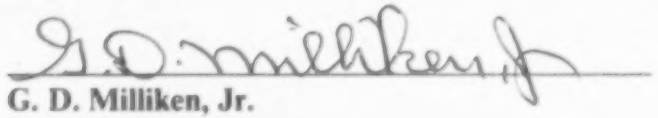
of this Brief.

Thus, it is clear that the Kentucky Courts of last resort have not decided a Federal question, but rendered an Order and Opinion based upon the failure of the Petitioner, John M. Foster and Virginia Foster to comply with the Rules of Civil Procedure on Appeal. The Supreme Court of the United States reaffirms the right of the Supreme Court of Kentucky to adopt and enforce its rules of procedure. Please make reference to Part V., Jurisdiction of Writ of Certiorari, Rule 17.

The Petition for Writ of Certiorari fails to disclose any ground for jurisdiction of this action under Part V, Rule 17.

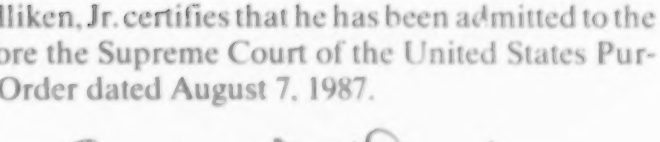
Thus it is clear from the reading of the Petition for Writ of Certiorari filed in this action that there are no grounds which provide for jurisdiction of the Supreme Court on this Petition. This Petition should therefore be denied and we respectfully request the Supreme Court of the United States to deny the Petition for Writ of Certiorari in this action.

Respectfully.



G. D. Milliken, Jr.
Attorney for Respondent
1039 College Street
P.O. Box 1926
Bowling Green, KY 42101
(502) 781-6800

G. D. Milliken, Jr. certifies that he has been admitted to the practice before the Supreme Court of the United States Pursuant to an Order dated August 7, 1987.



G. D. Milliken, Jr.

CERTIFICATION

This is to certify that a true and correct copy of the foregoing was this day mailed to Mr. John M. Foster, Pro Se, 5121 Gallatin Road, Scottsville, Kentucky 42164 and a copy to Hon. John C. Scott, Clerk of the Supreme Court of Kentucky, Capitol Building, Frankfort, Kentucky 40601.

This the 12 day of Aug, 1988

G. D. Milliken, Jr.

G. D. Milliken, Jr.

APPENDIX

1. Order of Allen Circuit Court dated June 25, 1987 directing hearing on attorney's fees.

2. Copy of Notice of Appeal.

3. Rule 73.03, Kentucky Rules of Civil Procedure.

4. Order of Court of Appeals of Kentucky Dismissing Appeal.

5. Copy of Hutchinson et al vs. Hutchison, 168 S. W. 2nd 738 (Ky.) 1943.

6. Copy of Braden vs. Republic-Vanguard Life Insurance Company, 637 S. W. 2nd 241 (Ky.) 1983.

7. Order of Cour of Appeals denying Motion for Reconsideration.

8. Order of the Supreme Court of Kentucky denying Motion for Discretionary Review.

9. Part V. Jurisdiction on Writ of Certiorari, Rule 17. United States Supreme Court Rules.

10. Appendix.

COMMONWEALTH OF KENTUCKY
49TH JUDICIAL CIRCUIT

ALLEN CIRCUIT COURT CASE NO. 84-CI-032

COMMONWEALTH OF KENTUCKY
TRANSPORTATION CABINET
DEPARTMENT OF HIGHWAYS PLAINTIFF

Vs. ORDER

JOHN FOSTER and
VIRGINIA FOSTER, wife DEFENDANTS

In the above-styled case the defendants were previously represented by Mr. G. D. Milliken, Jr., an attorney at law, but whose services were terminated by the defendants. Thereafter on July 15, 1986, Mr. Milliken filed an Assertion of Lien for reasonable attorney's fees pursuant to KRS 376.460. Subsequent to the filing of this lien assertion Mr. Milliken filed an itemized statement of services rendered and the same has been of record in the file of this case since October 31, 1986.

The above-styled case has now been concluded by trial before a jury and trial order and judgment was entered upon jury verdict on April 23, 1987. No appeal or other matter has been filed by the defendants herein except defendants file dismissal of attorney, Mr. Robert M. Alexander, which was received in the office of the Circuit Court Clerk on June 22, 1987, and is of record.

Pursuant to the trial order and judgment, which rendered a judgment in favor of the defendants John Foster and

ALLEN CIRCUIT COURT CASE NO. 84-CI-032

wife, Virginia Foster, the plaintiffs have forwarded a check in the amount of $2,359.56 as payment for the difference between the amount of the jury verdict and the amount previously paid to defendants upon the orders of the Court based upon recommendation of the duly appointed appraisers. This check is now in the possession of the Clerk, Allen Circuit Court, and is ordered to be held by that Clerk pending further orders of this Court.

IT IS NOW ORDERED that Mr. G. D. Millliken, Jr., previous attorney for the defendants, and the defendants John Foster and wife, Virginia Foster, shall be and appear before this Court at 10:00 a.m. on Tuesday, July 7, 1987, for the purpose of a hearing as to what will constitute a reasonable attorney's fee, said fee when determined to constitute a lien against the check in the hands of the Clerk, Allen Circuit Court.

This Order entered pursuant to KRS 376.460.

ENTERED this 25th day of June, 1987.

CC: ATTY HUDDLESTON
ATTY MILLIKEN
ATTY ALEXANDER
MR FOSTER
MRS FOSTER

clyde M. Thomas
CLYDE M. THOMAS, JUDGE

BY: Bobbie Rutherford D.C.

CERTIFICATION OF COURT RECORDS

I, Orel F. Meador, Clerk of the Allen [illegible] District Court, do [illegible] and true and correct copy of the original document(s) as [illegible] in my office.
In testimony whereof witness my hand as Clerk aforesaid this the 22nd day of June And Last 1987.

By: Bobbie Rutherford D.C

Commonwealth of Kentucky
42th Judicial Circuit

Allen Circuit Court Case No. 84-CI-032

Commonwealth of Kentucky
Transportation Cabinet
Department of Highways Plaintiff

Vs. Notice of Appeal

John M. Foster, and Wife
Virginia Foster Defendants

Notice is hereby given that, in the above-styled cases, the order on August 20, 1987 which was filed of record with the Circuit Court Clerk Allen Circuit Court, on August 25, 1987, and the order on September 16, 1987, which was filed of record with the Circuit Court Clerk, Allen Circuit Court, on September 18, 1987, are being appealed.

This the 22nd day of September 1987.

John M Foster
for Defendants

Certification

Certification is hereby given that on this day a copy of the foregoing is being placed in the U.S. Mail addressed to Attorney G.D. Milliken, Jr., P.O. Box 1926, Bowling Green, Kentucky 42102.
This the 22nd day of September 1967.

John M. Foster
for Defendants

Commonwealth Of Kentucky

Court Of Appeals

NO. 87-CA-2067-MR

JOHN M. FOSTER, ET AL. — APPELLANTS

v. APPEAL FROM ALLEN CIRCUIT COURT
ACTION NO. 84-CI-000032

TRANSPORTATION CABINET,
COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF HIGHWAYS — APPELLEE

* * * * * * * * * * * * * * * * *

ORDER

BEFORE: LESTER, CLAYTON, and COOPER, JUDGES.

This Court, having considered the motion to dismiss filed by the Honorable G. D. Milliken, Jr., the response thereto, and being otherwise sufficientiy advised, ORDERS that the motion be, and it is hereby GRANTED and the above-styled appeal is hereby DISMISSED for the following reasons. The notice of appeal, filed by the appellants, who are proceeding pro se, did not name G. D. Milliken, Jr. as an appellee in the caption or in the body of the notice of appeal. The orders appealed relate solely to attorney fees for which Mr. Milliken filed a lien pursuant to KRS 376.460 for his representation of the appellants herein in the case of Commonwealth of Kentucky,

Transportation Cabinet, Department of Highways v. John M. Foster, Virginia Foster, and Southeastern Natural Resources, 84-CI-032.

CR 73.03 requires that the notice of appeal identify by name all the appellants and all the appellees. The notice of appeal in the above-styled action listed the Commonwealth of Kentucky, Transportation Cabinet, Department of Highways as plaintiff and John M. Foster and Virginia Foster as defendants. In designating appellees, the appellant(s) must be careful to include all parties whose interest must be represented in order for the appellate court to grant complete relief. An attorney is an indispensable party who must be named in the notice of appeal if any attorney's fee has been awarded to that attorney and is to be challenged, Hutchinson v. Hutchinson, Ky., 168 S.W.2d 738 (1943).

The supplemental motion to dismiss is DENIED as MOOT.

ENTERED: NOVEMBER 16, 1987

Charles B. Lester
JUDGE, COURT OF APPEALS

to the giving of the notification. The clerk shall note on each copy thus served the date on which the notice of appeal was filed, and shall note in the civil docket the names of the parties to whom he mails the copies, with date of mailing.

[Amended effective July 1, 1969; July 1, 1976; January 1, 1978; January 1, 1985.]

Source: FRCP 73(b).

Rule 73.04 Supersedeas Bond

(1) Whenever an appellant entitled thereto desires a stay on appeal, as provided in Rule 62.03, he may present to the clerk or the court for approval an executed supersedeas bond with good and sufficient surety. The address of the surety shall be shown on the bond. The bond shall be in a fixed amount and conditioned for the satisfaction of the judgment in full together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, including costs on the appeal and interest as the appellate court may adjudge.

(2) When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the trial court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond.

(3) When the judgment determines the disposition of the property in controversy as in real actions or replevin, or when such property is in the custody of the sheriff, or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay. A supersedeas bond may be given to stay proceedings on a part of a judgment, and in such case the bond shall be varied so as to secure the part superseded.

[Amended effective June 1, 1960; April 1, 1963; July 1, 1976.]

Source: FRCP 73(d); CC 748, 751.

Rule 73.05 [Bond on Appeal]

[Repealed effective January 1, 1978.]

Rule 73.06 Failure to File or Insufficiency of Supersedeas Bond

(1) The appellee may move the trial court in which the supersedeas bond is filed for a hearing to determine the sufficiency of the bond or the surety thereon.

(2) If a supersedeas bond is not filed or if the bond filed is found insufficient, and if the action is not yet docketed with an appellate

appeals or motions for discretionary review (except Rule 76.20(2)(a)) does not affect the validity of the appeal or motion, but is ground only for such action as the appellate court deems appropriate, which may include:

(a) A dismissal of the appeal or motion for discretionary review,

(b) Striking of pleadings, briefs, record or portions thereof,

(c) Imposition of fines on counsel for failing to comply with these rules of not less than $250 nor more than $500, and

(d) Such further remedies as are specified in the applicable Rule.

If an appeal has not been docketed, the parties with the approval of the trial court may dismiss the appeal by stipulation in that court, or that court may dismiss the appeal upon motion and notice by the appellant.

(3) When the right of appeal in special civil cases is granted by statute, such appeals shall be prosecuted as provided in KRS 446.190.

(4) If an appellate court shall determine that an appeal or motion is frivolous, it may award just damages and single or double costs to the appellee or respondent. An appeal or motion is frivolous if the court finds that the appeal or motion is so totally lacking in merit that it appears to have been taken in bad faith.

[Amended effective July 1, 1976; January 1, 1978; July 1, 1981; January 1, 1985; July 5, 1985; January 1, 1987.]

Source: FRCP 73(a).

Legislative Research Commission Note

The appeal from the Small Claims Division of District Court is governed by KRS 24A.340, which provides that an appeal may be taken within 10 days of the judgment to the appropriate circuit court.

Rule 73.03 Notice of Appeal

(1) The notice of appeal shall specify all the appellants and all the appellees; "et al." and "etc." are not proper designation of parties. The notice of appeal shall also designate the judgment, order or part thereof appealed from. The party or his attorney filing the notice of appeal shall certify that a copy of the notice was served upon all opposing counsel, or if a party is not represented by an attorney, then to the party at his last known address, prior to the filing of the notice with the clerk of the court.

(2) When the notice of appeal is filed, the clerk shall serve notice of the filing of the notice of appeal by mailing a copy thereof to the clerk of the appellate court and to the attorney of record of each party other than the appellant, or, if a party is not represented by an attorney, then to the party at his last known address; but his failure to do so does not affect the validity of the appeal and such notification is sufficient notwithstanding the death of the party or his attorney prior

law may have been committed only one bond could be required—that in any event a new bond may be required only where an offense is committed after the satisfaction of the judgment as to the prior bond. This argument, however, does violence to the plain terms of the statute which directs that the court, upon conviction, shall require the execution of the bond. It is the time of conviction that controls the execution of the bond not the time of the commission of the offense. No question is before us as to any supposed right appellant might have had to an earlier trial on the possession charge or as to the consequences that might have ensued from the requirement of separate bonds at approximately the same time.

Since the police court rightfully required the execution of the bond on appellant's conviction on the possession charge, the trial court correctly sustained the demurrer to the petition.

Affirmed.

203 Ky. 270

HUTCHINSON et al. v. HUTCHINSON.

Court of Appeals of Kentucky.

Feb. 12, 1943.

1. **Judgment** ⇐349

In a court of continuous session, the chancellor loses jurisdiction over his judgments 60 days after rendition thereof unless such jurisdiction is retained expressly or the running of the 60 day period is suspended by an order or some pending proceeding. KRS 451.130.

2. **Appeal and error** ⇐327(7)

An allowance of fees to an attorney directly makes him a "party" to the litigation, and if he has been allowed a fee to be taxed as costs, such part of the judgment cannot be vacated or modified unless the attorney be treated as a party and be expressly made a party on appeal to the Court of Appeals.

See Words and Phrases, Permanent Edition, for all other definitions of "Party".

3. **Divorce** ⇐197

Where trial court denied wife a divorce, he properly allowed her attorney a fee to be taxed as costs. KRS 453.120.

4. **Divorce** ⇐197

Where trial court dismissed wife's divorce petition and allowed her attorney a fee to be taxed as costs, and on wife's motion for new trial on ground that judgment was contrary to the evidence and the law, set aside the judgment dismissing the petition, and granted the divorce, some seven years later trial court was not authorized to set aside the judgment allowing the attorney's fee, where jurisdiction over such part of the judgment was not retained. KRS 451.130, 451.140, 453.120.

Appeal from Circuit Court, Jefferson County; Churchill Humphrey, Judge.

Divorce action by Velma Caldwell Hutchinson against James C. Hutchinson. Plaintiff's petition was dismissed and a $300 allowance for fees of her attorney was directed. Plaintiff's motion for new trial was sustained and judgment of dismissal was vacated and plaintiff was granted a divorce. Some seven years later the allowance of fees for plaintiff's attorney was set aside and plaintiff and her attorney moved the Court of Appeals to grant an appeal.

Motion sustained, appeal granted and judgment reversed.

Joseph M. Hayse and J. W. Clements, both of Louisville, for appellant.

J. L. Richardson, Jr., of Louisville, for appellee.

STANLEY, Commissioner.

On April 16, 1932, the court entered the following judgment in a suit for divorce being prosecuted by Mrs. Velma Caldwell Hutchinson:

"The Court being sufficiently advised, it is ordered by the Court that the petition herein be and the same is hereby dismissed at the defendant's costs.

"It is further ordered by the Court that the plaintiff's attorney herein, Joseph M. Hayse, be and he is hereby allowed a fee of $300.00 for his services rendered herein. It is further ordered by the Court that no attempt shall be made to collect the said fee of $300.00 for a period of one year, and

said attorney is hereby ordered and directed to notify the Court at the time he attempts to collect the said fee.

"It is further ordered by the Court that this action be and the same is hereby retained on the docket as to all further orders concerning the separate maintenance of the plaintiff herein."

The plaintiff promptly moved for a new trial. KRS 451.140. On September 30, 1932, the court sustained the motion and vacated "the judgment heretofore entered in this case dismissing the petition of the plaintiff," and granted her a divorce, with $2,000 alimony. The defendant's motion to set that judgment aside was taken under consideration, and on April 22, 1933, the plaintiff responded with certain pleadings, including a motion that her attorney be allowed $1,000 for his services. On December 30, 1933, "all pending motions were overruled." On January 6, 1934, the defendant moved to set that order aside and the plaintiff moved that the court order the clerk to issue an execution against the defendant for the $300 fee allowed her counsel on April 16, 1932. Several successive orders were entered setting the case for hearing on the motions or remanding the same. It was finally submitted on April 25, 1934, but nothing was done by the court until almost seven years later. On March 18, 1941, Joseph M. Hayse, attorney for the plaintiff, pursuant to notice served on the defendant, moved that the court pass on his motion of January 6, 1934, to direct the clerk to issue an execution for his fee of $300. The court then overruled that motion and under "retained power," as stated in the order, set aside the judgment allowing the fee. This left the attorney for the wife with no allowance of a fee although the court had granted the wife a divorce with substantial alimony. Mr. Hayse and his client have moved this court to grant an appeal from that order. KRS 21.080.

[1] In a court of continuous session the chancellor loses jurisdiction over his judgments sixty days after rendition unless it is retained expressly or suspended by an order or some pending proceeding, with certain exceptions inapplicable here. KRS 451.130; Trapp v. Aldridge, 67 S.W. 834, 23 Ky.Law Rep. 2430; Stokes v. Commonwealth, 286 Ky. 391, 150 S.W.2d 892. We do not find anywhere in the record any order retaining jurisdiction over that part of the judgment relating to the allowance of the fee of $300. It will be noted that it was only provided in the judgment of April 16, 1932, that the attorney should make no attempt to collect the fee for a period of one year and that he should notify the court when he did make that attempt. We are left entirely to conjecture as to the reason for attaching this condition. Whatever it was, the order was obeyed. It was nearly two years before the attorney made any such attempt and that was by asking the court to direct the issuance of an execution. His motion lay dormant for seven years longer and then the court not only overruled it but sua sponte undertook to set aside the judgment, which, by the way, had been allowed by another judge.

[2, 3] In support of this action the appellee submits that the judgment had been vacated on the plaintiff's motion by the order of September 30, 1932; hence, there was no basis for the later effort to collect the fee. That order only set aside "the judgment heretofore entered in this case dismissing the petition of the plaintiff," and then proceeded to grant a divorce as prayed. The motion was by the plaintiff and manifestly related to the adverse portion. The grounds were that it was contrary to the evidence and the law. The attorney in whose favor the judgment went did not join in or make any motion. The allowance was not made to the plaintiff but to the attorney personally. It has long been held that the allowance to an attorney directly makes him a party in interest to the litigation, and if he has been allowed a fee to be taxed as cost, such part of the judgment cannot be vacated or modified unless he be treated as a party and on appeal to this court be expressly made so. Woford v. Woford, 267 Ky. 787, 103 S.W.2d 296, 297. In this new judgment of September 30, 1932, no reference was made to the allowance of a fee for plaintiff's attorney. Regardless of the fact that the court had denied the wife a divorce by the first order, he had properly allowed her attorney a fee, to be taxed as cost. KRS 453.120. The then chancellor did not regard the second order as vacating his allowance of the fee, for he later overruled the plaintiff's motion to allow him $1,000. His successor undertook to set it aside under a retained power which was nonexistent.

[4] We are of opinion, therefore, that the court was without jurisdiction to set aside the judgment allowing the fee made

on April 16, 1932 (Williams v. Williams, 107 Ky. 496, 54 S.W. 716), and that the appellants are entitled to processes of the court to collect the judgment.

Wherefore the motion for an appeal is sustained, the appeal granted and judgment reversed.

293 Ky. 273

EDMISTON v. ROBINSON et al.

Court of Appeals of Kentucky.

Feb. 12, 1943.

1. Automobiles ⇐246(21)

Instruction that if driver of automobile in which guest was riding suddenly turned into the path of other colliding automobile causing driver of other automobile to be confronted with an emergency and that in exercise of a reasonable judgment the latter crossed to his left to avoid a collision, the law was for other driver, was proper.

2. Negligence ⇐2

One who by another's negligence is placed in a position of peril and thereby compelled to act in the emergency is not held to the same strict rule in the exercise of ordinary care required of one not facing danger.

3. Automobiles ⇐159

Driver faced with a "sudden emergency" caused by approaching automobile suddenly turning across highway may take the course which appears safest and if he injures another in so doing he will not be held liable if his conduct constituted ordinary care although the course he follows was the wrong one.

See Words and Phrases, Permanent Edition, for all other definitions of "Sudden Emergency".

4. Automobiles ⇐246(21)

In guest's action resulting from head-on collision of automobiles, where driver of approaching automobile was on right side of highway until automobile in which guest was riding created emergency by suddenly turning to the left, instruction as to the duties of driver of approaching automobile was not erroneous in failing to require him to drive on right side of highway.

5. Trial ⇐253(4)

An instruction directing jury to find a verdict for guest against owner of automobile in which guest was riding at time of collision, unless jury found guest was guilty of contributory negligence, could not be objected to on ground that it failed to enumerate all the duties imposed on driver of automobile in which guest was riding.

6. Automobiles ⇐224(5), 245(87)

Where automobile guest objected to speed on a curve but between the curve and scene of the accident several miles beyond the driver drove in a prudent manner, it was not incumbent upon guest to complain further and his failure to do so did not raise a submissible question of contributory negligence.

7. Appeal and error ⇐1066
Automobiles ⇐246(58)

In action by guest against owner for injuries sustained in automobile collision, where evidence was insufficient to form basis for instruction on contributory negligence and court instructed jury to find for guest unless it believed his negligence contributed to the accident and verdict was for owner the giving of contributory negligence instruction was reversible error, since verdict was necessarily bottomed upon such instruction.

Appeal from Circuit Court, Lincoln County; K. S. Alcorn, Judge.

Action by Roy Edmiston against Denver Robinson and John Huddleston to recover for injury sustained when an automobile driven by the defendant Huddleston in which plaintiff was a passenger, collided with an automobile driven by defendant Robinson. From a judgment for defendants entered on the verdict of the jury, plaintiff appeals.

Judgment affirmed as to defendant Robinson, and reversed and remanded as to defendant Huddleston.

Jay W. Harlan, of Danville, and Kelly J. Francis, of Stanford, for appellant.

Edward J. Hogan and Edwin O. Davis, both of Louisville, and Pat Rankin, of Stanford, for Robinson.

Stanley Badesch, of Louisville, and Herbert Reynolds, of Stanford, for Huddleston.

of a firearm at the scene of a crime. Kentucky's legislature was obviously motivated by similar concerns when it established KRS 533.060(1). Our statute provides for no exceptions from the meaning of "use." The Kentucky Court of Appeals was exactly correct when they construed the use of a firearm consistent with our legislature's intent to include the creation of a potential for death or injury by the very presence of a firearm in the hands of the criminal.

Both parties cite Websters Dictionary as a basis of their position concerning the construction of the word "use" as set out in the statute.

The ordinary and accepted meaning of the word "use" includes both an active and passive sense. "Use" in this statute is a noun. The definition of the noun "use" in Websters Third New International Dictionary includes the ability or power to use something. Clearly the thief had the ability to use the shotguns in display. Mere display escalates the situation to a dangerous and risky level. Actual display is not required. Haymon had "ure" of the weapons.

The definition of "use" in Black's Law Dictionary, includes the purpose served, a purpose, object or end for useful or advantageous nature. Here Haymon's commission of first-degree burglary involved a firearm which had the capacity of being used for an advantageous purpose. His crime came within the prohibition of the statute.

It should be recognized that the statute in question involves restricting the legislative grant of the privilege of probation. The power to grant probation is not inherent in the courts but is conferred by the legislature. *Lovelace v. Commonwealth*, 285 Ky. 326, 147 S.W.2d 1029 (1941). The legislature has authorized the courts to grant probation with the limitation that probation may not be granted where the offense is a Class A, B or C felony and the commission of the crime involved the use of a firearm. The provisions of the statute must be strictly construed. The trial judge properly ruled that it was not permitted to consider probation because the offense involved a firearm.

In order to more correctly reflect the true legislative intent, I would hold that being armed with a weapon is a "use" of the weapon within the meaning of KRS 533.060(1).

Wanda Gene BRADEN, Movant,

v.

REPUBLIC-VANGUARD LIFE INSURANCE CO., Respondent.

Supreme Court of Kentucky.

Sept. 21, 1983.

Widow of deceased mortgagor sought to recover from a credit life insurer the balance of mortgage payments due. The Jefferson Circuit Court entered summary judgment in favor of the insurer and the appeal by the widow was dismissed by the Court of Appeals and a motion for discretionary review was granted. The Supreme Court, Leibson, J., held that where the mortgage holder had taken little or no active part in pursuing the merits of the claim or attacking the insurer's defenses, the mortgage holder was not an indispensible party to the widow's appeal from summary judgment in favor of the insurer since it would be satisfied by being paid either from the insurance proceeds or by mortgage payments.

Decision of the Court of Appeals reversed, motion to dismiss appeal overruled, and case remanded.

1. Insurance ⇐624.1(1)

Where deceased mortgagor's estate was a named beneficiary of credit life policy to extent of any sum due over and above

amount necessary to pay off mortgage holder's claim and was also a de facto beneficiary of entire amount, whereas mortgage holder, already secured by mortgaged property, was a beneficiary in a technical sense, mortgagor's widow had standing to pursue claim on behalf of estate regardless of whether mortgage holder choose to do so. Rules Civ.Proc., Rule 17.01.

2. Insurance ⇐624.1(3)

Although the real beneficiary of credit life policy was the deceased mortgagor's estate, which would be relieved of the mortgage debt upon payment to the mortgage holder of the policy proceeds, where the mortgage holder, already secured by the mortgaged property, was a beneficiary in a technical sense, trial court did not err in requiring the joinder of the mortgage holder in action by the deceased mortgagor's widow to recover under the policy on behalf of the estate. Rules Civ.Proc., Rule 17.01.

3. Appeal and Error ⇐430(1)

Failure of notice of appeal to specify any party whose absence prevents the Supreme Court from granting complete relief among those already parties is fatal to an appeal. Rules Civ.Proc., Rule 17.01.

4. Appeal and Error ⇐327(2)

Where the real beneficiary of the credit life policy was the deceased mortgagor's estate, and the mortgage holder, which was a beneficiary of the policy in a technical sense, had been forced into the case by the insurer, which had demanded its presence as an indispensible party, but the mortgage holder had taken little or no active part in pursuing the merits of the claim or attacking the insurer's defenses, the mortgage holder was not an indispensible party to the widow's appeal from summary judgment in favor of the insurer since it would be satisfied by being paid either from the insurance proceeds or by mortgage payments. Rules Civ.Proc., Rule 17.01.

5. Appeal and Error ⇐328

The rules do not require joinder of a party as an indispensible party to an appeal if that party is unnecessary to the decision of the appeal and would incur an unnecessary expense if its presence was required.

Steven J. Kriegshaber, Louisville, for movant.

Thomas C. Hundley, Phillip J. Shepherd, Lexington, for respondent.

LEIBSON, Justice.

Wanda Gene Braden is the widow of Paul T. Braden, named insured in a life insurance policy issued by Republic-Vanguard Life Insurance Co. The purpose for the policy was to cover the balance on the mortgage on the Braden home in the event of Paul Braden's death. The policy provides that the mortgage holder as shown in the application is "beneficiary to the extent of (its) interest in the policy proceeds as creditor of the Insured at the date of the Insured's death. Any balance of policy proceeds will be paid to the Estate of the Insured." The original mortgage holder was Pence Mortgage Co., which subsequently assigned the mortgage to Baldwin-United Mortgage Co.

After Paul Braden's death, Wanda Gene Braden sued Republic-Vanguard for the payoff amount stated in the policy. The defense on the merits is based on a claim that the insured took his life in violation of the policy's suicide exclusion and the further claim of material misrepresentation in the insured's application for the policy in failing to report psychiatric treatment.

Immediately after the suit was filed, Republic-Vanguard moved to dismiss for failure to join the mortgage holder as an indispensable party. The court ordered that the mortgage company would be joined or the case dismissed. An Amended Complaint was filed naming Baldwin-United as an additional party, so that it could be paid off according to its interest in the event the claim was successful.

Subsequently the court sustained Republic-Vanguard's Motion for Summary Judgment as to the merits, finding material misrepresentation in the application as a matter of law. The trial court further

ruled that the dismissal as to Braden's claim was a final appealable order. Eight days later the trial court issued a separate order dismissing the claims of Baldwin-United, but did not specify the dismissal was a final and appealable order. Baldwin-United is still a party in the trial court in the event the case is reversed.

Braden appealed from the summary judgment. On motion of Republic-Vanguard the Court of Appeals dismissed the appeal for failure to join Baldwin-United as a necessary party to the appeal. Braden's Motion for Discretionary Review to this Court was granted. We find that Baldwin-United was not a necessary party to Braden's appeal. We reverse and remand the case to the Court of Appeals to consider the merits of the trial court's summary judgment.

The trial court ordered joinder of Baldwin-United as an indispensable party under CR 19.01. The question on this appeal is not whether the trial court was correct in considering the mortgage holder an indispensable party at the trial level. The question is whether it is indispensable in deciding Braden's appeal.

Quite obviously the real beneficiary of this policy is Braden's estate which is relieved of a debt of $30,325 upon payment of the policy proceeds to the mortgage holder. The mortgage holder, already secured by the mortgaged property, is beneficiary in the technical sense. Braden's estate was the real party in interest as that term is used in CR 17.01.

In *Aetna Insurance Co. v. Solomon*, Ky., 511 S.W.2d 205, 208 (1974) we stated:

> "The prevailing rule enunciated by this court is that one for whose benefit a contract is made may maintain an action thereon in his own name even though the undertaking is not directly to or with him."

[1] In *Aetna, supra*, certain owners of property damaged by fire who were not named as insured in the fire insurance policy were permitted to maintain an action as real parties in interest against the claim that they were not named beneficiaries on the contract. The same rule should apply to this appeal even though the primary beneficiary on the policy is the mortgage holder. Braden's estate is a named beneficiary to the extent of any sum due over and above the amount necessary to pay off the mortgage holder's claim, and the *de facto* beneficiary of the entire amount. As such Braden had standing to pursue this claim regardless of whether Baldwin-United chooses to do so also.

[2–4] We find no error in the trial court requiring the joinder of Baldwin-United under CR 19.01 because Baldwin is the named beneficiary of the policy. But we see no reason to require Baldwin-United as an indispensable party to the appeal. CR 73.03 requires that a "notice of appeal shall specify all of the appellants and all of the appellees ..." Failure to specify any party whose absence prevents the appellate court from granting complete relief among those already parties would be fatal to the appeal. *Levin v. Ferrer*, Ky., 535 S.W.2d 79 (1975). But the only relief the appellant seeks in this case is reversal of the summary judgment with remand to the trial court to decide whether Republic-Vanguard has an affirmative defense to payment of the policy coverage. Assuming the appellant should prevail upon the merits, the judgment may still order Baldwin-United, which is still a party at the trial level, paid according to its interest in the proceeds. The critical difference is who is necessary to pursue the claim and who has a right to the proceeds. For this reason *New York Life Ins. Co. v. McCane*, 276 Ky. 712, 124 S.W.2d 1057 (1939), dealing with who is necessary at the trial level, is not applicable. Assuming the claim is ultimately successful Baldwin-United will receive payment, but Braden's estate will receive the benefit. As the party standing to receive the benefit, Braden's estate has standing to pursue the claim.[1]

1. The question of who should be the nominal plaintiff, Braden's widow or Braden's estate, is not before us. If necessary, the pleadings can be amended under Rule 15 to reflect the proper

[5] Baldwin-United has been forced into this case by the appellee who has demanded its presence as an indispensable party. Baldwin-United has taken little or no active part in pursuing the merits of the claim or attacking the life insurance company's defenses. It appears to be satisfied that it will be paid either from the insurance proceeds or by mortgage payments. There is no incentive for Baldwin-United to pay the expenses which arise in connection with an appeal. We do not interpret the rules as requiring joinder as an indispensable party to an appeal of a party who is unnecessary to the decision of the appeal and who would incur an unnecessary expense if its presence was required.

We have been asked to address several other procedural issues: whether Baldwin-United can be made a party to the appeal when no final judgment was entered in the trial court against them and whether the motion to dismiss was timely made. Our decision that Baldwin-United was not a necessary party makes it unnecessary to decide these issues.

For the reasons stated herein we reverse the decision of the Court of Appeals, order the motion to dismiss overruled, and remand the case to the Court of Appeals to decide the merits of the appeal.

STEPHENS, C.J., and AKER, GANT, LEIBSON, STEPHENS and VANCE, JJ., concur.

WINTERSHEIMER, J., not sitting.

plaintiff. *Lawrence v. Marks*, Ky., 355 S.W.2d 162 (1962).

OHIO CASUALTY INSURANCE COMPANY, Appellant,

v.

Alfredo CISNEROS, Appellee.

Court of Appeals of Kentucky.

Aug. 26, 1983.

The Circuit Court, Whitley County, J.B. Johnson, Jr., J., entered judgment in favor of insured awarding him no-fault and uninsured motorist benefits, and insurer appealed. The Court of Appeals, Hogge, J., held that: (1) trial court did not err in denying motion for new trial based on presence of a convicted felon on the jury where challenge to qualifications of that juror were not made before jury was impaneled, and (2) defense of fraud was unavailable to insurer in suit for no-fault and uninsured motorist benefits where insurer failed to plead fraud as an affirmative defense.

Affirmed.

1. New Trial ⇐55

Trial court did not err in denying motion for new trial based on presence of a convicted felon on the jury where challenge to qualifications of that juror were not made before jury was impaneled. KRS 29A.080.

2. Jury ⇐110

Statutory section providing that there be no waiver of juror disqualifications is directed to judge in his activities in drawing up a jury list and provides that he cannot waive any of the disqualifications in order to allow a prospective juror to serve. KRS 29A.080(3).

3. Jury ⇐127

Any challenge to qualification of a juror must be made before the jury is impaneled.

Commonwealth Of Kentucky

Court Of Appeals

NO. 87-CA-2067-MR

JOHN M. FOSTER, ET AL. — APPELLANTS

v. — APPEAL FROM ALLEN CIRCUIT COURT
ACTION NO. 84-CI-000032

TRANSPORTATION CABINET, COMMONWEALTH OF KENTUCKY, DEPARTMENT OF HIGHWAYS — APPELLEES

* * * * * * * * * * * * * * *

ORDER

BEFORE: LESTER, CLAYTON and COOPER, JUDGES.

This Court, having considered the motion for reconsideration of this Court's order, entered November 16, 1987, dismissing the above-styled appeal, the response thereto, and being otherwise sufficiently advised, ORDERS that the motion be, and it is hereby, DENIED.

ENTERED: January 21, 1988

Charles B. Lester
JUDGE, COURT OF APPEALS

Supreme Court of Kentucky

87-SC-79-D
(87-CA-2067-MR)

JOHN M. FOSTER and
VIRGINIA S. FOSTER — MOVANTS

V.

ALLEN CIRCUIT COURT
#84-CI-032

G. D. MILLIKEN, JR. — RESPONDENT

ORDER DENYING MOTION FOR DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED March 22, 1988.

Robert F. Stephens

Chief Justice

legislation or other intervening matter not available at the time of the party's last filing. A supplemental brief, restricted to such new matter, may not exceed 10 pages. Forty copies of any such brief, prepared in accordance with Rule 33 and served as prescribed by Rule 28, shall be filed.

.7 After consideration of the papers distributed pursuant to this Rule, the Court will enter an appropriate order. The order may be a summary disposition on the merits. If the order notes probable jurisdiction or postpones consideration of jurisdiction to the hearing on the merits, the Clerk forthwith shall notify the court below and counsel of record of the noting or postponement. The case then will stand for briefing and oral argument. If the record has not previously been filed, the Clerk of this Court shall request the clerk of the court possessed of the record to certify it and transmit it to this Court.

.8 If consideration of jurisdiction is postponed, counsel, at the outset of their briefs and oral argument, shall address the question of jurisdiction.

[Amended November 21, 1980.]

PART V. JURISDICTION ON WRIT OF CERTIORARI

RULE 17. CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI

.1 A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2 The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the United States Court of Appeals for the Federal Circuit, the United States Court of Military Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

[Amended effective August 1, 1984.]

RULE 18. CERTIORARI TO A FEDERAL COURT OF APPEALS BEFORE JUDGMENT

A petition for writ of certiorari to review a case pending in a federal court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court. See 28 U.S.C. § 2101(e); see also, United States v. Bankers Trust Co., [55 S.Ct. 407] 294 U.S. 240 [79 L.Ed. 885] (1935); Railroad Retirement Board v. Alton R. Co., [55 S.Ct. 758] 295 U.S. 330 [79 L.Ed. 1468] (1935); Rickert Rice Mills v. Fontenot, [56 S.Ct. 374] 297 U.S. 110 [80 L.Ed. 513] (1936); Carter v. Carter Coal Co., [56 S.Ct. 855] 298 U.S. 238 [80 L.Ed. 1160] (1936); Ex parte Quirin, [63 S.Ct. 1] 317 U.S. 1 [87 L.Ed. 3] (1942); United States v. Mine Workers, [67 S.Ct. 677] 330 U.S. 258 [91 L.Ed. 884] (1947); Youngstown Sheet & Tube Co. v. Sawyer, [72 S.Ct. 863] 343 U.S. 579 [96 L.Ed. 1153] (1952); Wilson v. Girard, [77 S.Ct. 1409] 354 U.S. 524 [1 L.Ed.2d 1544] (1957); United States v. Nixon, [94 S.Ct. 3090] 418 U.S. 683 [41 L.Ed.2d 1039] (1974).

RULE 19. REVIEW ON CERTIORARI—HOW SOUGHT—PARTIES

.1 A party intending to file a petition for certiorari, prior to filing the case in this Court or at any time prior to action by this Court on the petition, may request the clerk of the court possessed of the record to certify it, or any part of it, and to provide for its transmission to this Court, but the filing of the record in this Court is not a requisite for docketing the petition. If the petitioner has not done so, the respondent may request such clerk to certify and transmit the record or any part of it. Thereafter, the Clerk of this Court or any party to the case may request that additional parts of the record be certified and transmitted to this Court. Copies of all requests for certification and transmission shall be sent to all parties to the proceeding. Such requests to certify the record prior to action by the Court on the petition for certiorari, however, should not be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by this Court.

.2 When requested to certify and transmit the record, or any part of it, the clerk of the court possessed of the record shall number the

CERTIFICATION

This is to certify that a true copy of the Brief in opposition to Petition for Writ of Certiorari for lact of proper jurisdiction, contents, authorities and appendix were mailed this date to John Foster, Pro Se, 5121 Gallatin Road, Scottsville, Kentucky 42164 and a copy to Hon. John C. Scott, Clerk of the Supreme Court of Kentucky, Capitol Building, Frankfort, Kentucky 40601.

This the 12 day of Aug 1988

G. D. Milliken, Jr.